IN THE MATTER OF ARBITRATION BETWEEN

UNIVERSITY OF MINNESOTA MEDICAL CENTER, FAIRVIEW	"Employer"	)	
		)	Termination
AND		)	
AFSCME COUNCIL 5	"Union"	)	

NAME OF ARBITRATOR: John J. Flagler

DATE AND PLACE OF HEARING: November 15, 2005; Minneapolis, MN

DATE OF RECEIPT OF POST-HEARING BRIEFS: December 8, 2005

APPEARANCES

FOR THE EMPLOYER:
Jan Halverson/Kristine Rock, Attorneys
Felhaber, Larson, Fenlon & Vogt, PA
220 South 6th Street, #2200
Minneapolis, MN 55402
Pedro Ramos, HR Representative
Peter Clayton, E.S. Manager
Kalsang Yangzom, E.S. Supervisor
Belay Mehretab, E.S. Lead S.P.
Solomon Tesfagiorgis, E.S. Custodian

FOR THE UNION:
Allen Lehrke
AFSCME Council 5
300 Hardman Avenue
South St. Paul, MN 55075
Kellie Christensen, Grievant
Cheryl Ogbozo, Chief Steward
Carol Christensen, Witness
Ricky Brown, Witness

INTRODUCTION

The Grievant, Kellie Christensen, was terminated by the University of Minnesota Medical Center, Fairview ("Fairview") on February 23, 2005, charged with continuous disruptive behavior in the workplace in violation of Fairview's Violent/Harassing/Disruptive Behavior Policy. Since 2000, the Grievant has received a series of disciplinary actions and Fairview has given the Grievant several opportunities to correct her behavior.

The Grievant received a verbal advisement on May 18, 2000, a written advisement on June 7, 2000, and a decision making leave on May 5, 2004, before she was finally terminated on February 23, 2005 following an incident that occurred on February 2, 2005. Fairview warned the Grievant that if her disruptive behavior did not improve, she would be subject to further discipline, including termination. The Grievant denied the behavior that led to her February 23, 2005 termination. Instead, she accused that co-worker Belay Mehretab on February 2, 2005 had verbally sexually harassed her.

Based upon the Grievant's record, and her final acts of disruptive behavior, Fairview decided to terminate the Grievant's employment.

RELEVANT CONTRACT PROVISIONS

ARTICLE 25
DISCIPLINE

Section 1. Purpose. Disciplinary action and discharge shall be taken only for just cause. Such action, except discharge, shall have as its purpose the correction or elimination of incorrect job related behavior by an employee.

Section 2. Disciplinary Procedure. The Employer shall have the right to discipline or discharge employees for just cause. Disciplinary action taken by the Employer shall be done in a manner that will not intentionally embarrass the employee before other employees or the public. Disciplinary action will be in the form of:

A. Oral warning given to employee specifying the nature of any incorrect job related behavior and pointing out that non-correction will result in further disciplinary action. Oral warnings shall be documented by use of a standard Employer form;
B. Written warning given to the employee specifying the nature of any incorrect job related behavior and pointing out that non-correction will result in further disciplinary action;
C. Suspension without pay given to the employee with a written explanation specifying the nature of any incorrect job related behavior and pointing out that non-correction will result in further disciplinary action; or
D. Discharge

The above list of types of disciplinary action, while subject to just cause principles, is not meant to imply a sequence of events.

ISSUE

Was the Grievant terminated for just cause? If not, what remedy applies?

BACKGROUND

The University of Minnesota Medical Center, Fairview, is a healthcare facility that provides a full range of health care services. Fairview is organized into numerous operational departments. The acts giving rise to the instant dispute occurred in the Environmental Services Department where the Grievant was employed.

Fairview has in place a Violent/Harassing/Disruptive Behavior Policy. This Policy, enacted in June of 1987, states:

> In accordance with Fairview's values of integrity, dignity, compassion and service, it is the goal of Fairview for all employees to work in an environment free from violent or disruptive behavior, any type of discrimination including freedom from sexual harassment (whether directed toward members of the same or opposite gender) and other forms of harassment. Fairview is committed to accomplishing this goal and expects all employees to do the same. Any acts of violent or disruptive behavior, sexual harassment or other forms of harassment by employees and non-employees will not be tolerated under any circumstances. Employees found in violation of this policy will be subject to immediate corrective action up to and including termination of employment.

The Policy defines "Harassing or Disruptive Behavior" as "verbal, written or other conduct which has the purpose or effect of substantially interfering with a person's work performance or creating a hostile, offensive, or intimidating work environment." "Violent Behavior" as defined as "any action that may involve verbal abuse, physical force, harassment, intimidation, or abuse of power or authority where the impact is to control another's behavior by causing pain, fear or emotional harm." Under the Policy prohibited acts of violent, harassing, or disruptive behaviors include:

> (a) Physical altercations; (b) Threats in the workplace or affecting the workplace; (c) Verbally abusive behavior (loud, profane, disrespectful) in the workplace, (d) Offensive or inappropriate comments, written materials or illustrations in the workplace, (e) Retaliation against an employee for filing a complaint about the above cited behavior.

Under "Penalties for Violent, Harassing, or Disruptive Behavior," the Policy provides:

> Employees may be subject to corrective action up to and including immediate termination of employment as warranted by the results of the investigation. The specific response shall be determined on a case-by-case basis after review of all relevant facts.

The Grievant was employed on the deep cleaning team in Environmental Services from 1991 until her termination in February of 2005.

On May 18, 2000, the Grievant was issued the following verbal warning for disruptive behavior:

> On May 16, 2000 the supervisor Marcail Parker attempted to give you an area assignment. You were not happy with the assignment, [and] rather [than] discussing the assignment you expressed that "you would not tolerate this bullshit." Kathy Anderson then warned you that such language would not be tolerated.
>
> It is the position of this hospital that threatening behavior of this type is not permissible. This is a violation of Fairview's HR Policy on Harassment/Disruptive Behavior and causes concerns for a structured operation and detrimental impact of undermining a supervisor's authority. This must be addressed in order to prevent chaos in the workplace and maintain a non-harassing work environment.

The warning indicated "[i]t is Environmental Services expectation that its employees comply with the attached policy regarding Harassment/Disruptive Behavior." The warning also stated that "we reserve the right to impose any corrective action up to and including termination depending on the severity of future occurrences," and that "[f]ailure to take corrective action and to continue your current practice will result in termination."

On June 7, 2000, the Grievant received the following written warning because of her harassment/disruptive behavior:

> On 5/21/00 there was an argument involving you and two other environmental services employees in the 6th floor utility elevator landing. Nursing staff reported that your profanity as well as other comments could be heard as far as the nursing station on 6C. Even when the two ES supervisors arrived you continued to shout at the two ES employees involved until one of the supervisors insisted that everyone disband. It is noted that you may have been verbally provoked by one of the two employees when you came off the elevator on your way to 6A. However, when you came back to the same elevator landing to confront those two employees again, it demonstrated that you were the primary aggressor in this conflict. This is also consistent with statements from nursing staff who stated that you were shouting over the other two ES employees. Considering the negative impact this disruptive behavior could have had on patients, visitors, and hospital staff, you are being given a written advisement.

The written warning indicated that this behavior constituted a violation of Fairview's Violent/Harassing/Disruptive Behavior Policy. The Grievant was warned that violation of the Policy "will advance the employee to termination of employment." The warning also stated,

"[f]ailure to take correct action and to continue your current practice will eventually result in termination." "You are warned that further incidents of poor conduct and performance may lead to your termination."

The third and final formal warning because of Grievant's continued disruptive behavior resulted in a three (3) day suspension on May 5, 2004. The suspension notice stated:

> On Monday, May 3, 200[4], at approximately 8:00 a.m. [the Grievant] was heard and witnessed yelling at her fellow employee, Estelle Williams. Her comments included language indicating she was not afraid of Ms. Williams which contributed to provoking the incident. The incident took place in a patient care area (6C/Service Elevators) and was clearly heard by managerial personnel. After being confronted by a lead person, [the Grievant] discontinued and [sic] further comments. Security was called and [the Grievant] was asked to leave the job until further notice. An investigatory meeting [was] held with [the Grievant] on Wednesday, May 5, 200[4] during which she admitted making the comments and being involved in a loud and disruptive altercation with her fellow employee. Interviews with five witnesses attest to events as described above.
>
> The actions of [the Grievant] are in clear violation of our policy regarding Violent, Harassing, and Disruptive Behavior [and] she is being given a three (3) day Decision Making Leave to be served beginning the balance of her shift Monday (May 3) and Wednesday (May 5). She will be expected to return to work Thursday, May 6, 2004.

The "expectations" section of the warning stated "[Grievant] will be expected to abide by all the employers policies most especially the Violent, Harassing, Disruptive Behavior Policy." Again, Grievant was warned that "any further violations of policies and or any other work rule/policy of a like or other serious nature will lead to further disciplinary action up to and including termination."

On February 2, 2005, at approximately 11:00 a.m., the Grievant allegedly sprayed Belay Mehretab, a co-worker, in his eyes with glass cleaner. Mehretab has worked in Environmental Services for approximately 18 years. He is from Eritrea, Africa, and has lived in the United States for approximately 25 years.

Mehretab testified that on February 2, 2005, he was in the 6th floor office at Fairview when the Grievant and her coworker Estelle Williams came to the office to get their lunch. The Grievant and Ms. Williams went outside the office. Mehretab opened the office door and put his cart by the door. The Grievant and Ms. Williams were at the 6th floor elevator, and when Mehretab looked up from grabbing something from his cart, the Grievant sprayed him in the face with glass cleaner. The glass cleaner got into his eyes and he went to the sink to wash out his eyes. Mehretab testified that he asked the Grievant "why you spray me?" The Grievant answered she did not mean to hurt him, and stated "I wanted to spray your hat." Mehretab asked why she wanted to spray his hat, and the Grievant said that she was sorry and that she did not want to hurt him.

Almaz Gesseseu, another co-worker, was also in the office during the occurrence of these events. According to Ms. Gesseseu's statement, although she did not see the actual spraying of the chemicals, she saw the Grievant come into the office. Mehretab asked the Grievant why she sprayed him in his eyes, and the Grievant responded, "I didn't mean it, I am sorry." Ms. Gesseseu also stated that the Grievant told Mehretab that she was trying to spray his hat.

According to Kalsang Yangzom, Mehretab's supervisor, she came into the office and saw her standing at the sink rubbing his eyes. Ms. Yangzom asked him what happened, and he indicated that the Grievant sprayed chemicals in his eyes. Ms. Yangzom asked Mehretab why, and he said that he did not know. Ms. Yangzom told him to fill out the incident report and go to the emergency room. Later in the day, Ms. Yangzom saw the Grievant and asked the Grievant what happened to Mr. Mehretab. The Grievant said "nothing" and she left. At no point did the Grievant make any claims to Ms. Yangzom of inappropriate comments by Mehretab.

In the incident report that Mehretab filled out, "I was standing in front of 6th floor office [when] [the Grievant] came in front of me and spray[ed] in my face with a glass cleaner. Both my eyes and my face [are] burning." He then went to the emergency room where he spent 2-1/2 hours. Mehretab was unable to go back to work for the next two days and had to use his own paid time off. He is still receiving treatment for his eyes.

At the arbitration, Peter Clayton, the Operations Manager for Environmental Services, testified that on February 2, 2005, Mehretab had given him a copy of the incident report and told Clayton that the Grievant had sprayed him in the eyes. Clayton telephoned Ms. Yangzom who reiterated what she saw and her conversations with the Grievant.

On February 4, 2005, Clayton gave the Grievant a "24 hours notice for meeting" on "injury to another employee," scheduled for February 7. When Clayton gave the Grievant the notice, she told him "[w]e were just horse playing around." Clayton testified that he considered the Grievant's response an admission that she sprayed Mehretab in the eyes. On February 4, 2005, the Grievant made no claims to Clayton regarding alleged inappropriate comments by Mehretab.

At the arbitration Mehretab stated that on or about February 5 or 6, 2005, he received a telephone call from the Grievant's mother, Carol Christensen. The Grievant testified that a woman, who he later found out was Carol Christensen, called him at work and left a message with a co-worker asking him to call her telephone number. Mehretab testified that Carol Christensen said "[the Grievant] sprayed on your eye. She want[ed] to joke, play with you. She want[ed] to spray your hat and accidentally spray[ed] your eye." Carol Christensen also stated that the Grievant was sorry, and that the Grievant would be fired if he "did not drop the case."

Carol Christensen testified that she called Mehretab to discuss sexually inappropriate comments that he allegedly made to the Grievant on February 2, 2005.

On February 7, 2005, Clayton and Pedro Ramos, Fairview's Human Resources Representative, met with the Grievant regarding the February 2, 2005 incident. A union steward also attended this meeting. The Grievant denied spraying chemical in Mehretab's eyes.

Although both Yangzom and Clayton had asked the Grievant about the incident prior to February 7, the Grievant alleged, for the first time, that Mehretab made sexually insulting comments to her. She claimed that Mehretab was making up the "eye spraying" incident because she had told him that she was going to talk to Human Resources.

The Grievant testified that she went to see Ramos on February 2, 2005 about the alleged sexual harassment. Ramos testified that no such meeting ever occurred. At the arbitration, Ramos testified that the Grievant "had never mentioned anything of the comments before February 7." Ramos indicated that he would need to get another human resources representative to deal with the sexual harassment claim as he was already dealing with the February 2, 2005 disruptive behavior incident. At that point, Jennifer Barkley, Fairview Human Resources Representative, met with the Grievant and began to investigate the sexual harassment claims.

Both Clayton and Ramos were involved in investigating the "eye spraying" incident. They interviewed all people that may have witnessed any part of the incident or may have had information regarding the event, including the Grievant, Mehretab, Gesseseu, Yangzom, and Williams.

During the investigation into the "eye spraying" incident, Williams' statement supported the Grievant's version of the story as to the alleged sexual harassment. However, as to the actual spraying of the chemicals, Williams admitted that "she did not see anything, she went to the bathroom."

During the investigation, when the Grievant was asked how the chemicals got into Mehretab's eyes, the Grievant explained that he may have gotten chemicals in his eyes from his buckets. Based on the investigation, Fairview concluded that the Grievant did in fact spray Mehretab with chemicals.

On February 7, 2005, when summoned to meet with Ramos and Clayton regarding the injury she caused to another employee, the Grievant raised allegations of sexual comments by Mehretab. The Grievant asserts that on February 2, 2005, Mehretab said to her "One day I'm going to hold you down and put my dick on your lips and pee in your mouth." She also claims that he said, "Well some day I'm going to pull your pants down." The Grievant claims that Mehretab told her, "He would take his penis out for fifty cents." Ms. Barkley investigated these claims and concluded that the Grievant's allegations were not substantiated. Ms. Barkley advised the Grievant and Pedro Ramos of her conclusions regarding the sexual harassment allegations.

On the same date, a grievance was filed asserting that Fairview failed "to deal with harassment." As a result, Barkley reopened and expanded the investigation of alleged sexual harassment. She interviewed at least 12 individuals. Only the Grievant and Williams said that they had ever heard Mehretab make any sexually inappropriate comments. Indeed, with those exceptions, the other employees interviewed by Barkley confirmed that Mehretab never uses inappropriate sexual language. Consequently, Barkley concluded the investigation and notified the Union in writing that the Employer was not able to substantiate the Grievant's allegations of sexual harassment.

Despite at least three prior formal disciplinary notices that Grievant would be terminated if she did not refrain from engaging in disruptive behavior, on February 2, 2005, Grievant again engaged in disruptive behavior in violation of Fairview's policy. As a result, Fairview made the decision to discharge her on February 23, 2005. The notice of discharge stated:

> On February 2, 2005, at approximately 11:00 a.m., you accidentally sprayed Belay Mehretab in the eyes with glass cleaner. As a result Belay was sent to the ER for medical treatment and missed 2-1/2 days of work. On Friday 2/4/05, when given a 24 hr notice to meet, you admitted to your manager, Peter Clayton, that is [sic] was horseplay.
>
> Horseplay is not acceptable in the work environment and is a violation of work rules for this very reason. Negligent injuries to employees are not only disruptive to the work environment, but also counterproductive and costly.
>
> As a result of your past history of disruptive behavior on 5/16/00, 5/31/00, 11/22/00, and most recently a decision making leave on 5/3/04, effective immediately, February 23, 2005, you are discharged.

POSITION OF THE EMPLOYER

It cannot be disputed that Mehretab got chemicals into his eyes. He filled out an incident report, he was treated at the emergency room, he missed two and one-half days of work because of the injury, and he still receives on-going treatment. The only disputed question is how Mehretab got the chemicals into his eyes.

Although there were no eyewitnesses to the actual spraying of the chemicals, testimony and statements from other co-workers and supervisors support the conclusion that the Grievant did engage in such conduct. According to Ms. Gesseseus's statement and testimony from Clayton and Ramos, seconds after Mehretab got chemicals into he eyes, Ms. Gesseseu saw him rubbing his eyes. The Grievant came into the office and Mehretab asked her why she sprayed him in his eyes, and she responded, "I didn't mean it, I am sorry." Ms. Gesseseu also stated that the Grievant told Mehretab that she was trying to spray his hat.

Ms. Yangzom testified that she came into the 6th floor office and saw him standing at the sink rubbing his eyes. Yangzom asked Mehretab what happened, and he indicated that the Grievant sprayed chemicals in his eyes. Later in the day, Yangzom saw the Grievant and asked her what happened to Mehretab. The Grievant said "nothing," and she left. The Grievant made no mention of sexually inappropriate comments.

In the incident report that Mehretab filled out minutes after chemicals got into his eyes, he described how the incident occurred: "I was standing in front of 6th floor office [when] [the Grievant] came in front of me and spray[ed] in my face with a glass cleaner. Both my eyes and my face [are] burning."

At the arbitration hearing, Clayton testified that on February 4, 2005, when she gave the Grievant the "24 hours notice for meeting," She stated "[w]e were just horse playing around," which Clayton considered to be an admission that she sprayed Mehretab in the eyes. No claims of sexual harassment were made to Clayton by the Grievant.

Mehretab has constantly testified about the events that occurred on February 2, 2005. His testimony at the arbitration was the same testimony that he gave minutes after the "eye spraying" incident occurred. Moreover, in his 18 years as an employee he has never received any disciplinary notices, and no person other than the Grievant has ever complained that he had made sexually inappropriate comments.

At the February 7, 2005 meeting regarding the "eye spraying" incident, the Grievant denied the allegations. Unlike Mehretab, there can be no question that the Grievant has motivation to lie about the incident because she had received three disciplinary notices for disruptive behavior, and she was aware that any further disruptive behavior would lead to her termination. For the disciplinary events to have occurred in the manner described by the Grievant, she admitted that no less than six people, including her "close friend" Estelle, had to be lying. In addition to Williams, according to the Grievant, Mehretab is lying; Gesseseu, a co-worker, is lying; Yangzom, a supervisor, is lying; Ramos, the Human Resources Representative, is lying; Clayton, the Environmental Services Operational Manager is lying.

Grievant was aware to raise allegations of sexual harassment until five days after the eye spraying incident occurred and after she received the "24 hours notice of meeting" regarding the injury to Mehretab is enough to make such allegations and testimony suspect.

Besides the Grievant and her mother, Ricky Brown was the only witness that the Union called on the Grievant's behalf. Brown did not testify about "eye spraying" incident. Instead he testified about events regarding the alleged sexual harassment. Brown testified that he saw Williams and the Grievant standing by the elevator on the 6th floor at approximately 8:15 to 8:30 a.m. Brown asserted that the Grievant went into the office and when she came out she was upset and said "he always asks me to suck his dick." Brown admitted that he did not hear the conversation. Brown also testified that he heard the Grievant say that she was going to go to Human Resources. However, this testimony has no relevance to whether or not the Grievant engaged in the alleged disruptive behavior. When interviewed during the investigation into the alleged sexual harassment, Brown never specified that the Grievant stated that "he always asks me to suck his dick" or that she was "going to HR on him." Instead, Brown stated, "I wasn't really a witness [Ms. Williams] was there on landing and walked back. Heard [the Grievant] say quit talking to me like that."

Any alternative theories as to how the chemicals would have gotten into Mehretab's eyes do not make sense. The Grievant testified that Mehretab may have gotten chemicals into his eyes from his bucket. However, both Clayton and Ramos testified that such chemicals are not carried in a bucket. The only other potential theory is that Mehretab intentionally put the chemicals into his eyes to rebut apparent sexual harassment allegations, which were not brought forth until five days after the incident occurred. That theory is patently absurd.

Fairview's Violent/Harassing/Disruptive Behavior Policy sets forth that "[a]ny acts of violent or disruptive behavior, sexual harassment or other forms of harassment by employees and non-employees will not be tolerated under any circumstances," and that "[e]mployees found in violation of this policy will be subject to immediate corrective action up to and including termination of employment." The Grievant admitted that she knew that Fairview had this policy.

The Policy defines "harassing or disruptive behavior" as "verbal, written or other conduct which has the purpose or effect of substantially interfering with a person's work performance or creating a hostile, offensive or intimidating work environment." There can be no question that an employee spraying a co-worker in the eyes with chemicals which resulted in the co-worker missing 2-1/2 days of work and still having to receive ongoing treatment for the injury constitutes harassing or disruptive behavior, whether it was allegedly an accident or not. This incident has the effect of substantially interfering with Mehretab's work performance in that he was unable to perform his job for over two days and was required to use his own paid time off while recovering from the injury.

Progressive discipline is the hallmark of a discharge for just cause. A system of progressive discipline has two primary objectives, a system of penalties for misconduct and progressive discipline to put an employee on notice that she must correct her behavior or eventually face discharge.

Fairview gave the Grievant plenty of opportunity to improve her behavior. On numerous occasions, Fairview warned the Grievant of the consequences of her behavior if she did not improve.

Each time the Grievant was disciplined for her disruptive behavior, Fairview reiterated its expectations about her behavior and conveyed to her the consequences if she again engaged in disruptive behavior and filed to abide by Fairview's Policy. In fact, Fairview expressly communicated to the Grievant on at least three occasions that failure to take corrective action with respect to her disruptive behavior would result in termination.

Because the Grievant was provided ample opportunity to correct her behavior and she failed to do so, Fairview had just cause to discharge the Grievant.

In this case, because of the Grievant's instances of disruptive behavior, Fairview had the right to discharge her. It made the decision to discharge the Grievant only after it issued three separate formal disciplinary actions to her regarding disruptive behavior.

There was nothing about the Grievant's response to the disciplinary process which suggested that the Grievant intended to "fix" her behavioral problems. Rather than accepting responsibility and working to improve her behavior, the Grievant has suggested that the blame for her conduct rests elsewhere.

For example, at the hearing, she claimed that she did not deserve the June 7, 2000 written warning because another employee called her an "ugly bitch." The Grievant also testified that her "close friend" Ms. Williams lied about the events that lead to the Grievant's

May 5, 2004 decision-making leave. Most significantly, she even denies spraying Mehretab in the eyes with the cleaning solution, despite the absence of any other plausible explanation as to how that occurred. The Grievant's protestations simply serve to explain why she continued to engage in disruptive behavior – she never believed that she was doing anything wrong.

Given the overwhelming evidence in this case concerning the Grievant's disruptive behavior, Fairview's decision to terminate her employment should stand.

POSITION OF THE UNION

The Grievant is an experienced and dedicated custodian. She was hired by the University of Minnesota originally in 1979. She worked there as a Nurse's Aide until 1989, left the hospital for a year and a half and returned to work as a custodian in 1991. She has been a custodian for 11 years and an employee of the University Hospital/Fairview University Medical Center for a total of 25 years.

The Grievant was liked and respected by co-workers and customers. She has numerous letters, referenced in her testimony, that she received in support of her case from co-workers calling her a valuable employee and her last review conducted in June of 2003 says that she is good worker and gets along well with co-workers.

The Grievant was being sexually harassed by Belay Mehretab. For several months, most recently at approximately 8:00 a.m. on February 2, 2005. At approximately 8:15 in the morning of February 2, 2005, she went into the office/store room to get additional supplies. Ricky Brown testified that the conversation he had had with the Grievant prior to her returning to the office/store room was a light, happy conversation. She returned from the office red faced and upset.

The Grievant was seen visibly shaken from the last encounter with Mehretab. After leaving the office/store room and an encounter with Mehretab, Brown testified she was shaken, visibly upset and told both him and Estelle Williams what Mehretab had said. Brown testified he told Grievant to report this to Human Resources.

The Grievant complained of sexual harassment to Human Resources Representative Pedro Ramos immediately after this incident. She testified that she had told Mehretab that she was going to HR to report him and testified that she immediately went to Pedro Ramos's office to do so.

The Grievant was referred to Jennifer Barkley by Ramos. Kellie testified that Ramos told her she would need to talked to Jennifer Barkley regarding this type of matter.

Pedro Ramos is the Human Resource person for Environmental Services. Ramos testified as he is Human Resource person and had Environmental Services as one of his accounts.

Ms. Barkley is charged with investigating sexual harassment complaints and did indeed investigate the Grievant's claim. The Grievant did then contact Barkley per Ramos's direction. Barkley completed the investigation. Her notes regarding this investigation are included as part of the Employer's exhibits.

There are no witnesses to the alleged spraying. No witness, either at the hearing, or in the employer's own investigation said they saw the spraying. Only one employee, who changed her story a week after being questioned the first time as part of the investigation, said Mehretab complained of his eyes. Kalsang Yangzom testified that she only saw Mehretab a while after the alleged incident. She told him if his eyes were sprayed to go to the Emergency Room. Yangzom made a report on the alleged incident only after the Grievant was terminated.

The Grievant did not spray window washing chemical at Mehretab. She testified that she did not spray chemicals in Mehretab's eyes and that she knew the issues with chemicals and would never direct them at another person. Mehretab testified that he and the Grievant did not have a friendly relationship that would allow this type of interaction.

The Employer acknowledged that they had no proof Mehretab was sprayed with window cleaner. By the Employer's own admission, they had no proof that what was in Mehretab's eyes was window cleaner. When asked under cross examination could it have been something else in his eyes, Ramos said yes it could have been.

There was no evidence produced by the Employer that this incident ever happened. There were no witnesses who saw this incident happen. They could not substantiate what, if anything, was in the eyes of Mehretab. There was no medical testimony of any injury to the eyes. The only document produced was a note to schedule an appointment for an eye exam.

The complaining party, Belay Mehretab, attempted to make a preemptive strike against the Grievant before she could bring sexual harassment charges against him. A witness, Brown, with no reason to come forward except to explain what he saw, testified that she was very upset after coning out of the office/storage room where Mehretab was sitting and told Brown and Williams what had happened. He testified that this happened at about 8:00 in the morning. After the Grievant told Mehretab that she was going to Human Resources to make a complaint, Mehretab knew he was in trouble and told his supervisor, Yangzom, that he had been sprayed in the eyes. This occurred hours after he made the sexual comment. Yangzom made no written report of the spraying incident until after the Grievant was terminated on February 24, 2005. Mehretab's story was clearly designed to discredit the Grievant and even the supervisor was not concerned about it enough to file a written report at the time of the incident.

There are major credibility issues with the testimony and the actions of Mehretab. Mehretab told Peter Clayton that it was horse play. Yet at the haring Mehretab testified that he normally had no interaction with the Grievant. It is difficult to understand why they would be engaged in horse play if they didn't associate with each other.

Mehretab testified that the Grievant's mom had called him asking him to drop the charge or the Grievant would be fired. This testimony was refuted by Carol Christensen. It was stated

by Mehretab that the call occurred on Sunday the sixth of February. Only Friday, February 4th did the Grievant learn that she had a meeting to discuss what had happened that day. At no time did she think she was going to be fired until the day, over two weeks later, that she was told she was terminated. As a long time steward in her job at the University and at Fairview, Carol Christensen knew there was nothing Mehretab could do to have the "charges dropped" as Mehretab testified he was asked. Thus there is no reason for the Grievant's mom to call him other than what she testified to: that she was very upset at the "disgusting" comments made by him to her daughter.

The testimony and facts support the Grievant's version of what happened that day. The Grievant did indeed contact Human Resources to file a complaint against Mehretab. Jennifer Barkley did an investigation regarding that complaint. She testified this is that happened at it is evidenced by the Employer's own exhibits that this complaint was made.

Brown testified that he told the Grievant to file a complaint with Human Resources. She testified she went to Pedro Ramos's office immediately after the sexual comment incident. Ramos has the Environmental Services account for Fairview and would have been the person to go see with a problem from that area. She would not have gone to Jennifer Barkley had she not been referred to by Ramos.

The Grievant would not have had a reason to do that as a "preemptive strike" on Tuesday, since she had no knowledge of the spraying incident until she was told by Clayton on Friday the 5th of the Monday the 7th meeting.

It was this conversation with Clayton that the Grievant testified that when questioned about the spraying incident, she said "I can't believe he is playing that game." She did not say they were engaged in "horse play" as Clayton testified. She was referring to her concern that Mehretab was trying to get her in trouble before she could complain about the harassment incident.

Fairview had reason for choosing to believe Mehretab that had nothing to do with his story but had everything to do with the sexual harassment complaint. The Grievant had filed a sexual harassment complaint against a co-worker a few years ago. That complaint was investigated and she was told the person received some discipline as a result. Now she is coming forward again regarding a complaint of sexual harassment. Since this was the second time charges were brought forth against Fairview by the Grievant, clearly there could be potential legal issues for the Employer. Fairview wanted to believe that this never happened and slanted the investigation toward that end. Several of the people who were questioned testified that they had heard the comments made by Mehretab or had heard the Grievant complain of them long before February 2nd. But Fairview simply shrugged off this testimony and determined the witnesses were not credible.

It was much easier to fire the Grievant and get rid of the person making the complaint than to deal with the issue of harassment. Thus, the Grievant's testimony of what Barkley told her "just stay away from him."

No witness observed the alleged spraying incident. There is no testimony other than that of Mehretab that even places the Grievant in the area at 11:00 on that morning. No one testified they saw her there other than Mehretab. And certainly no one saw the spraying.

Absent proof, or even preponderance of evidence that his event occurred, the termination was "without just cause" and the Grievant should be reinstated with full back pay and benefits and in all ways be made whole and any record of this discipline be removed from her file.

The Union has shown that the Grievant did not spray Mehretab's eyes. The Employer went to great length to add hearsay testimony by Ramos of what his version of what happened was. But he only heard the story from others and had no first hand knowledge of any of the events. Virtually everything he testified to, save for the fact that he gave the Grievant the termination letter, was hearsay.

Mehretab offered no proof that this happened, only that he want to the Emergency Room to have his eyes looked at. Ramos could not state that anyone knew what, if anything was in Mehretab's eyes. From a hospital with all sorts of medical records it is difficult to understand why a physician's statement was not offered to prove that indeed Mehretab's eyes were sprayed and somehow damaged.

Mehretab testified that he and the Grievant had no relationship as friends. He testified that they only talked work. Since they did not kid or joke or anything, the Grievant would not have any reason to engage in "horse play" with Mehretab, as Clayton testified they both said.

Clearly something happened on the 6th floor at about 8:00 a.m. on Tuesday, February 2, 2005. There is credible testimony by Brown that the Grievant was upset by what was said to her by Mehretab. She testified that she went to Human Resources to complain about sexual comments made to her. Jennifer Barkley investigated these actions, so we know what complaint was made, just as the Grievant testified. The Union finds it very difficult to understand why one "he said/she said" incident was investigated and a termination was given but another "she said/he said" incident was swept under the rug.

There was much testimony by Mehretab and Tesfgiorgis that in their culture men do not talk that way. The Union would submit that in the culture that is ours, we do not tell women that we will "stick my dick in your mouth and piss in your throat" either. But there is no question that these comments happened. The Union would submit that if the evidence shows that these comments did indeed happen then the statements and testimony of the person making the claim against the Grievant is not credible. Since there is no credibility in Mehretab's testimony, the grievance must be sustained and the Grievant be reinstated and made whole in all ways.

DISCUSSION AND OPINION

As the parties acknowledge in their briefs, this case ultimately turns on a credibility resolution between the conflicting testimony of several witnesses who appeared at the hearing. A substantial body of research has gone into the many treatises that guide arbitrators and the courts in the search for elusive truth in the web of contradictory and competing testimony often encountered at hearings.

The one universal agreement among authorities who have studied and written extensively about credibility issues appears to be that rarely do adjudicators of disputes ever find with absolute certainty truth of the matter before them. Instead we determine which of the versions of disputed events is the more probable by choosing the likely over the less likely, the verifiable over the unsupported. By this weighing and winnowing out process the best approximation of the truth emerges. This will be the process used in the following review.

As the moving party, Fairview asserts that the Grievant did, in fact, spray co-worker Belay Mehretab in the eye with a glass cleaner, and then concocted a sexual harassment charge against him to deflect attention from his violation of the Employer's Violent/Disruptive/ Harassment Disruptive Behavior Policy. The Union's position asserts that the complaining party, Belay Mehretab attempted to make a pre-emptive strike against the unfounded accusation of the Grievant's spraying him in the eyes before the Grievant could bring sexual harassment charges against him.

In regard to these separate issues Fairview argues that if the Grievant is found guilty of spraying the irritating chemical into Mehretab's eyes, the question of her sexual harassment charge becomes irrelevant. I don't believe this construct of the case applies in view of the Union's claim that Mehretab's accusations against the Grievant are meant as a mere pre-emptive diversion from his serious violations of the Employer's sexual harassment policy.

In the interest of the clearest resolution of the charge against the Grievant for which she was discharged, it is important to first decide question of whether or not Mehretab made the sexually degrading remarks. If so, then his version of being sprayed by the Grievant loses some degree of credibility. If the sexual harassment accusation is found to lack merit, however, then the charge against the Grievant can be reviewed unencumbered by any shadow of pretext.

The Accusation of Sexual Harassment

The Union argues that both the charges of spraying Mehretab's eyes and of sexual harassment are mere "he said/she said" controversies. I cannot agree. Such disputes presuppose that the only basis for resolving the issue, absent direct eye witnesses, consists of the conflicting stories of the two disputants. In the instant case, by contrast, a considerable amount of circumstantial evidence was produced by each party with regard to both issues from witnesses who witnessed neither alleged event.

A common misunderstanding holds that circumstantial evidence is essentially infirm and therefore unreliable. In reality, finders of fact recognize that circumstantial evidence can be a

fully probative device.[1] Indeed, depending on the fact situation circumstantial evidence can be even more reliable and instructive than direct evidence which may be subject to the various defects in direct eye witness testimony.

The key to the probative value of circumstantial evidence lies in the strength of the inferences that may be drawn from such evidence. If only one truly reasonable inference can be drawn then it may be found that the circumstantial evidence is powerful. Where more than a single inference may be drawn, then deferential weight must be given to the most probable over the less likely inferences available.

In situations where the circumstantial evidence gives rise to equally reasonable (or equally illogical) inferences, such evidence obviously provides no support to the proposition put forth.

Application of these well-established principles of adjudication to the circumstantial evidence at hand guides the following analysis.

In regard to the Grievant's accusation that Mehretab used foul and degrading sexual remarks to her, the Grievant offers the circumstantial evidence of co-worker Ricky Brown's testimony and that of her mother, former employee Carol Christensen.

Brown testified that about 8:15 to 8:30 a.m. on February 2, 2005 he observed the Grievant looking red faced and visibly upset coming from an office/storage room where Mehretab was sitting. Brown states that because she had conversed with him in a light pleasant manner before going to the area where Mehretab was, Brown asked her what was wrong.

He testified that the Grievant told him and co-worker Estelle Williams that Mehretab had been using foul language toward her for months and had just said to her "I'll stick my dick in your mouth and piss in your throat" as well as other disgusting remarks. Brown testified further that he heard her say "quit talking to me like that." Then as she was leaving the room where he knew Mehretab was sitting and believing the Grievant had been sexually harassed, Brown advised her to file a complaint.

Findings and Conclusions

It should be noted at the outset that Brown's testimony relates to the same day as the alleged eye spraying incident. The inference can be as readily drawn that the Grievant's upset appearance that Brown testified he observed was caused by the eye spraying incident rather than by the alleged foul remarks she later reported that Mehretab had made. This inference depends, however, on reconciling conflicting versions of the approximate time when Brown said that he saw the Grievant leaving the room where Mehretab was sitting and the time the Grievant stated Mehretab had made sexually offensive remarks to her.

The versions given by the Grievant and her supporting witnesses as to what allegedly transpired between the Grievant and Mehretab conflict on the question of when he supposedly

[1] Hill and Sinicropi, Evidence In Arbitration, BNA Books (1980), pp. 5, 6.

directed foul remarks to her. Brown testified that he saw the Grievant leave the office/supply room in a red faced, upset condition at about 8:15 a.m. The Grievant contradicted Brown in her report to H.R. representative Jennifer Barkley when she placed the time of the alleged remarks as "mid AM" – perhaps some two hours later.

Even more contradictory was the testimony of Brown and the Grievant concerning where Estelle Williams was standing at the time Mehretab allegedly voiced his obscene words. According to Brown's written statement "Estelle was there on the landing" and in his hearing testimony "I wasn't a witness. I walked back towards Estelle and heard Kelly say `quit talking to me like that' as she left the office where Mehretab was sitting."

The Grievant, however, gave a different version of where Estelle was located at the critical time. She reported to Barkley that "I went to the office and Estelle went to the bathroom." She then continued her statement by saying "Estelle was there and heard it" (Mehretab's alleged obscenities). The Grievant affirmed this description in her hearing testimony.

Estelle Williams did not testify at the hearing but did file a written statement saying that she was present and heard the remarks Mehretab allegedly directed at the Grievant. In her written statement Williams added a curious P.S. which reads: "I just want to make everything clear that I did not witness the incident concerning…that Belay [sic] was sprayed [sic]…I was not around. I was in the bathroom at the time."

No firm support for the accusations against Mehretab can reasonably be drawn from the welter of confusing and contradictory testimony, i.e., Did the alleged insulting language incident happen at 8:15 a.m. according to Ricky Brown or a couple hours later as reported by the Grievant? Was Williams outside the office on the landing at the time per Brown's testimony or in the office according to the Grievant? Or possibly working in the bathroom where she reported she was when "Belay was sprayed with the spray bottle."

Williams written statement might possibly be read to mean the alleged spraying incident may have happened on some other day. Such a reading, however, would not be consistent with Brown's version that he observed the Grievant on a distressed condition at 8:15 in the morning of February 2, 2005. Further, the testimony of Mehretab and that of his supporting witness all agree that the alleged spraying incident occurred the same day as Williams and Brown stated their version of Mehretab's supposed misconduct.

In regard to the appearance of the Grievant's mother, Carol Christensen, arbitrators rarely give much probative weight to the inherently biased testimony of parents, spouses and close personal friends. Accordingly, Christensen's testimony that the purpose of her phone call to Mehretab was to chastise him for the insulting remarks her daughter reported to her lacks credibility. The more likely version of the reason for her call was to plea with Mehretab to drop his accusation of being sprayed in the eyes by the Grievant, as Mehretab testified.

This leaves only the unsupported testimony of the Grievant as to her sexual harassment charge against Mehretab versus his version which stands supported by the consistent testimony

of the several Fairview witnesses. As between the two primary subjects, the Grievant's registers as the less credible for several reasons:

- She claims to have approached Human Resource Director Pedro Ramos about her sexual harassment accusations against Mehretab later on the day of the alleged occurrence. Ramos testified that he first heard these accusations on February 7 and that he immediately referred the Grievant to H.R. representative Jennifer Barkley. Ramos' testimony is supported by the contemporaneous notes taken by Ms. Barkley whose records begin with his interview with the Grievant that same day.

- Further testimony challenging the Grievant's account of when she filed her sexual harassment complaint came from Fairview E.A. Manager Peter Clayton, who notified her on February 4 to report for the investigative hearing on "injury to another employee" scheduled for February 7. Clayton stated that the Grievant replied to the notice "We were just horse playing" and made no mention of any verbal sexual harassment by Mehretab at the time. Clayton testified further that he first learned of the Grievant's accusations against Mehretab at the February 7 interview, three days later.

By testifying falsely about the time of her reporting her sexual harassment claim to Ramos, the Grievant seriously compromised her credibility. The fact that she never filed her accusations against Mehretab until after she learned that he had reported the injury to his eyes casts further doubt on her account of sexual accusation against him. Any possible credibility remaining in regard to her charge of Mehretab's use of foul sexual insults against her dissolves in the face of the fact that she waited some four years of such alleged verbal abuse, according to her testimony, before taking action only after learning that her job was at risk from his report that she had sprayed him in the eyes.

It should be further noted, that H.R. representative Jennifer Barkley conducted a full and fair investigation into the Grievant's accusations against Mehretab. The hearing record contains recordation's of her several interviews with employees who may have been able to provide useful information about the Grievant's accusations against Mehretab. Of the eleven interviewees, only Estelle Williams and Ricky Brown gave any degree of support to the allegations.

On the basis of the information she gathered, Ms. Barkley concluded in her report that the Grievant's sexual harassment charge could not be substantiated. Her conclusions merit appropriate weight in this review.

Conclusion

Based on the foregoing analysis, I hereby find that the accusation of verbal sexual harassment made against Belay Mehretab by the Grievant lacks merit and are, hereby, dismissed from consideration in review of the misconduct charge against the Grievant that resulted in her discharge.

**

The main predicate of the Grievant's case is that the spraying incident never happened and that Mehretab concocted the whole scenario as a means of deflecting attention from his own misconduct. That proposition collapsed under the weight of the credible and substantial evidence leaving her denial that she caused any injury to Mehretab's eyes as the sole testable issue for resolution.

Fairview as the moving party has the burden, of course, of proving that the Grievant did, in fact, spray cleaning fluid from a spray bottle into Mehretab's eyes. The record shows that the Employer met this burden of proof by presenting a strong prima facie case. That body of substantial proof consists of the following elements:

- The treatment slip from Dr. Huang shows that Mehretab did, in fact, suffer "Cornea/Anterior Segment" injury requiring immediate and periodic medical attention. Environmental Services Manager Peter Clayton reported that Mehretab missed at least two and one half days due to this injury.

- E.S. employee Almaz Gesseseu, who was working in the same office/supply room as the Grievant and Mehretab on the morning of February 2, stated to Clayton and Ramos that while she did not actually see the Grievant spray Mehretab, she observed him rubbing his eyes. Ms. Gesseseu reported further that when Mehretab asked the Grievant why she sprayed him in the eyes, she replied "I didn't mean it, I'm sorry" and that the Grievant told Mehretab that she was only trying to spray him on his hat.

- Independent of Gesseseu's report, E.S. Supervisor, Kalsong Yangsom, testified that shortly after she entered the 6th floor office, she saw Mehretab standing at the sink rubbing his eyes. Ms. Yangzom asked him what was wrong and she reported that he responded that the Grievant had sprayed him in the eyes with a chemical. Later, that same day, according to her testimony, Ms. Yangzom encountered the Grievant and asked her what had happened to Mehretab. The Grievant replied "Nothing" and walked away.

- Clayton testified that when he gave the Grievant notice to appear before the hearing on the injury to Mehretab's eyes, she replied "Oh, we were just horse playing." Conversely she made no mention of any use of foul language to her by Mehretab in this meeting with Clayton who testified that he first learned of this accusation at the investigative hearing three days later.

Analysis

In order to believe the Grievant's denial that she was guilty of spraying Mehretab in the eyes, it would be necessary for her to provide an affirmative defense and rebuttal to disprove or at least to cast doubt on the truthfulness of these damaging reports. She was unable to do either.

In plain fact, the Grievant's entire defense against Fairview's strong prima facie case consisted of her discredited accusation of verbal sexual harassment against Mehretab and

repeated assertions that every witness who gave testimony against her was lying. The following summary of cross examination of the Grievant proves particularly revealing:

> As to Ms. Gesseau, the Grievant was asked "If [Ms. Gesseau] said that she saw you in the 6th floor office telling Mr. Mehretab you were sorry, she would be lying?" The Grievant answered yes. As to Ms. Yangzom, the Grievant was asked, "If [Ms. Yangzom] said she asked you what happened to Mr. Mehretab and you said 'nothing,' she would be lying?" The Grievant answered yes. As to Mr. Ramos, the Grievant was asked, "if Mr. Ramos said you never came to see him on February 2, this would be untruthful?" The Grievant answered yes. As to Mr. Clayton, the Grievant was asked "when Mr. Clayton handed you the [24 hour meeting] notice, he says you told him you were just horsing around – did that happen?" The Grievant answered that was not her statement.

Indeed, the Grievant even casts doubt on the credibility of one of the witnesses who supported her accusations of misconduct against Mehretab, Estelle Williams. At the arbitration hearing, the Grievant testified on cross-examination that Ms. Williams had lied about the disruptive incident which resulted in her May, 2004 suspension.

The sole question remaining for determination, therefore, asks whether the Grievant's proven misconduct in causing injury to her fellow employee constitutes just cause for terminating her employment.

It is bedrock arbitral law that where guilt of misconduct has been proven, the arbitrator should not substitute his judgment for that of the employer as to penalty without strong mitigating circumstances such as disparate treatment or a penalty so harsh as to offend the conscience of a reasonable person. Certainly, it cannot be said that the penalty in this case is unduly harsh in view of the Grievant's prior record of disruptive behavior for which she was afforded progressive disciplinary treatment as well as clear and timely warning that discharge would result from failure to correct such misconduct.

Standing alone, the spraying incident constitutes a most serious violation of Fairview's Violent/Harassing/Disruptive Behavior Policy. The significant injury to Mehretab resulting from the Grievant's careless horseplay warrants first and effective action from Fairview in view of the hospital's legal and moral responsibility for maintaining a safe and healthful work environment. Failure to act forcefully to penalize behavior which places employees at risk of serious injury places Fairview at substantial liability exposure.

The Union presented no claim of disparate treatment or any other grounds for possible mitigation.

The Union argued that the prior disciplinary episodes could not be considered because of the terms of Article 25, Sec. 5 which states:

> Upon request of the employee, all written documents relating to any oral or written disciplinary warning will be removed form the employee's personnel file at any time after three (3) years from the date of the most recent incident providing no further warnings or other disciplinary actions have been given in the intervening period.

It has not been three years since the last incident which shows the Grievant at the suspension disciplinary step with a warning that discharge will result from further like offenses. Further, the Grievant never requested removal of any documents from her file.

DECISION

Based on the foregoing evidentiary analysis and conclusions therefrom, the grievance is denied.

____1/8/06_____ _____

Date John J. Flagler, Arbitrator